Sustainability first Viewpoint

The independent charity and think tank shaping sustainability policy and regulatory agendas for UK utilities, for the benefit of consumers, citizens and the environment.

Sustainability, governance and public utilities – the role of the Company Secretary in putting the company's purpose into action

Expert Viewpoint – Fiona Smith

As part of the Fair for the Future project being undertaken by Sustainability First, we wanted to carry out an additional targeted review of how sustainability issues are addressed by the governance arrangements at shareholder, board and executive level. To do this, we spoke to four Company Secretaries in various companies, in different utility sectors and with different ownership structures to explore the challenges they face and tools they have used to put their company's purpose and licence to operate into action. These Chatham House interviews were conducted in April/May 2020, during the corona lockdown period.

An interesting aspect of doing this work has been that it caused me to reflect on what I have learnt from my own experience in doing the role for nearly twenty-five years and also being a non-executive director (NED) for nearly fifteen years. I have been Company Secretary and General Counsel in two listed utilities (National Grid and Severn Trent), in the public sector (Transport for London) and in a public corporation, which is a Non-Departmental Public Body and Trustee of a Master Trust Pension (NEST Corporation). I have also been a NED in two building societies (Coventry Building Society and Manchester Building Society). These roles have given me experience different, highly regulated sectors, in organisations that are extremely well run and efficient; as well as those facing many challenges due to poor values and poor business decisions; and in organisations going through huge change where failure to deliver is not an option from a political and regulatory perspective.

This paper is therefore in two sections. The first feeds back on the discussions with current Company Secretaries and the second is a personal perspective on what is involved in the role in public utilities and some questions for all involved in governance arrangements to consider when thinking about how to put their purpose into action and make their company more sustainable.

Feedback on discussions with current Company Secretaries in public utilities

The Company Secretary plays a critical role in governance issues and has key relationships with shareholders, board members and executive teams so understanding how they approach their work is critical when considering how to develop and embed a purposeful business approach. **In some companies the role of the General Counsel and the Company Secretary are combined** but for the purposes of this paper I will refer throughout to the Company Secretary, albeit the perspective does address both roles.

Shareholders are increasingly focused on sustainability issues as are boards and executive teams. The collective drive to address these issues is executed differently in different companies, but it is clear that there is a universal focus on having sustainability at the heart of how companies carry out their business and it is a key aspect of reporting. In many ways, the pandemic, with the increased focus it has brought to questions of resilience, has accentuated this trend. While ownership structures obviously impact on how the role is carried out, as some of the technical aspects are different depending on whether the entity is listed or not, the clear need for **alignment of shareholders, boards and executives on purpose** came through clearly in all the discussions.

There was agreement around the importance of the mindset and approach of shareholders, boards and executives to drive the appropriate **culture and behaviours** in the company to develop and embed purpose. In the words of one participant, this needs to be part of the companies' cultural DNA. While words in constitutional documents and governance arrangements can clearly record and set out the desired approach, without passion and drive, these alone will not change and embed behaviours.

There was also a clear recognition that the Company Secretary has a key role to play in ensuring all parties have the **appropriate information** at the right time and in the most appropriate format to enable them to carry out their duties. This is important for licensed utilities where often the licensed entity is the subsidiary of a holding company and where (in water, for example) there are provisions in licence conditions requiring boards and committees to be competent and well run.

Working effectively with the Chairs of the Boards and key Committees and the Chief Executive, the Company Secretary can ensure that sustainability issues are a key part of the governance arrangements. In the interviews, it came across very explicitly that, while the Company Secretary is accountable for ensuring the organisation has the right arrangements and processes, this does not erode the need for the Chairman or Chief Executive to demonstrate leadership in this area. This **mix of leadership on purpose with effective processes** and reporting is key to embedding this across the company.

The area where there was some difference in opinion was **how 'hard wired' elements of public purpose should be in the company's Articles of Association etc**. Some felt that by doing so it was an explicit demonstration of the company's commitment. For example, by formalising what was already happening in Articles it made the approach more resilient in the longer term against changes in people and ownership. In addition, it gives a clearer, more explicit framework to address reporting, assurance and decision-making. Others felt that this formality was not required and that the regulatory framework, including licence conditions, supported by the culture of the organisation were sufficient.

This topic is one that is receiving increasing attention particularly within regulated utilities. My personal view is that there is a degree of inevitability that in the longer term there will be an increasing expectation that Articles are changed to address purpose. Companies who are already addressing these issues in a systematic and effective way should be able to do this without much additional work, as it should primarily be formalising the way in which the company is already operating.

However, there will always be a minority of companies who lag behind and who will be reluctant, for a number of reasons, to do this without there being a regulatory or legal requirement to do so. This usually, ultimately, leads to legislators/regulators deciding they need to make it a requirement to ensure a level playing field. In support of this view I would draw attention the changes made to disclosure requirements in Section 172 of the Companies Act 2006. Since 2019 it has been a requirement for large companies to produce a statement setting out how they comply. This was to ensure greater visibility and reporting on this topic and to give greater insight and assurance into how governance arrangements support compliance with the s172 duties.

Personal reflections on my experience as a Company Secretary

The remainder of the paper is my personal reflection on what I feel are the key attributes and requirements of a Company Secretary. It does not set out the technical requirements of the role, there are more than enough papers on this already, but sets out my observations on the attributes required to ensure that they add value and support the long-term success and sustainability of the company.

The Company Secretary is appointed by and can only be removed by the Board and owes its duty to the company as a whole. While normally the interests of the Chair, CEO and board are aligned this is not always the case and the Company Secretary must never lose sight of this requirement for **'independence'.** They should also make this clear on a regular basis so that it is not a surprise if this somewhat 'nuclear deterrent' is used. A key attribute of an effective Company Secretary is to have the skills and judgment to know when to dig their heels in and to have this view respected and listened to by colleagues. Building effective **relationships** is key to being able to do this.

In addition, if the Company Secretary is a solicitor, they owe duties to the Court and their own

regulatory body. The role of in-house lawyers and the regulation of them, has attracted more attention over recent years. The recent Independent Review of Legal Services Regulation carried out by Prof Stephen Mayson has a section on in house lawyers and the inherent tension in the relationship when the client for legal services is also the solicitor's employer. It states that, typically, in house lawyers would prefer to maintain their professional independence, ethics and standards and not bow to any organisational or commercial pressures to modify their advice to make it more palatable. However, it also recognises that this can be difficult and recommends the regulation of in-house teams to support this independence. There is a long way to go on before anything along these lines is implemented but it again shows a direction of travel on this topic. Personally, watching a senior and well respected in- house lawyer from News International being cross examined during the Leveson Inquiry on how they had carried out their role was a very salutary lesson to me and, I would think, all in house lawyers. He ended up being struck off as a solicitor. He had lost sight of his duties to his company and the court.

I have always felt that **the role placed me in a unique position** in the company as I worked right across all the different operating divisions and functions and, with my team, operated at all levels within the company. This gave me invaluable insight into what was happening and allowed me to join the dots in a way that was not easily available to anyone else. This insight into the whole organisation can provide a vital perspective into how purpose is embedded and how sustainability issues are treated in 'the round'. I loved being able to do this, which is the major reason I stayed doing this role for so long. Used wisely and with judgment this sometimes meant that we were able to avoid problems arising and could ensure that decisions were made at the right level and in the interests of the organisation overall. Done well and successfully the role is both a facilitator of business success but also a 'policing' role to ensure things are done properly. The challenge for all involved is to find the optimum balance between these two roles.

I have also usually been a member of the Executive and I have always found it helps if I have had a discussion with colleagues about how I see my **accountabilities** to ensure they and I have clear expectations of each other. Being upfront on the potential conflicts is always helpful. The tension in these two roles is most tested when there is a crisis and decisions need to be made at pace and often with incomplete information. Having a clear understanding of the role in advance is of assistance. This duality of roles can sometimes make the role a somewhat lonely one as it can be difficult to debate and discuss some of the tensions with colleagues. I have always found it of benefit to have a network of external, trusted people I could bounce topics and dilemmas off. In some instances, this would be a partner from one of the external law firms and in other friends who did similar roles. I also reciprocated when they had tricky issues!

I have always believed that there needed to be some **grit in the relationship** between me and my team and the rest of the organisation if the organisation was to be truly successful. I dislike it intensely when people seek to compartmentalise issues into legal/governance issues and business issues. There are few legal issues that do not have business ramifications and vice versa and it is by working an issue through properly and listening to each other that good decisions are made. If colleagues were telling me what a great job my team and I were doing I would be suspicious that either my team were being too lax on business, legal and compliance risks or my business colleagues were not pushing the boundaries or being innovative enough. This is particularly important for so called 'wicked' sustainability issues where the information, as well as the legal and regulatory requirements, may be incomplete or contradictory and judgement needs to be exercised.

When asked about what is key for an effective Company Secretary my somewhat flippant answer is **'to be nosy'.** By this I mean they need to be interested in and properly understand the business, where its money comes from, the key risks it faces and its future challenges. They also need to build relationships at all levels and **understand what people are doing and what is driving behaviours**.

In particular, is there are **difference between the rhetoric and what is happening at the coal face?** This will assist everyone to understand whether the messages are getting through and whether the company's purpose is being put into action.

When asked a question I would encourage my team not simply to answer the question but to think about what is being asked and why to understand if there is a bigger issue behind the query, which needed exploring. For me it was also crucial that I encouraged and supported my team to do this, as they were my eyes and ears. The secretariat and legal teams should use their privileged position working right across the organisation to spot where action in one part of the business could impact on other parts and make connections. Again, an important issue for sustainability which can often rely on a **balanced approach and necessitate trade-offs**.

Often there will not be a clear-cut answer and it will be by ensuring that proper account is taken at the appropriate level that good decisions are made. In addition, **working in a highly regulated entity rarely allows you the luxury of being able to express a view without appreciating the context, both regulatory and political, within which you and your organisation operates**. While it is true for most areas, it is particularly important in relation to sustainability issues and compliance issues more generally. A test I have always set myself is to consider whether winning the battle on one point may be worth risking defeat in the war! I know from painful experience that it is easy to get carried away in the belief that your position is right and not to adequately consider what are the ramifications if you are wrong either legally or ethically. In heavily regulated entities, regulation is here to stay, and regulatory relationships are long-term. – even though they may of course evolve. This must be recognised by all concerned. We will all have seen and experienced potentially negative changes to the regulatory and legal frameworks brought about by people pushing the boundary too far. In addition, experience has told me that the regulator will normally be able to get you in the end if you try and be too smart!

For me a **key skill that a board should look for in a Company Secretary is the capability to read how things are developing in the regulatory and governance area with the drive to ensure that their organisation is ready for change when it arises**. In the longer term this should lead to lower operating costs as designing processes with this in mind should avoid the cost of retrospective change.

Another important topic **is how do any of us know what is happening down in our organisation** and how do we drive the appropriate behaviours. In my experience it was often more junior members of my team who faced most pressure to give advice and to be told the business issues are not for them to consider. To address this, I developed a number of approaches over the years. First, I encouraged my team to escalate to and discuss with more senior colleagues any issue they were not comfortable with for any reason. I was explicit with everyone that this is what I expected from my team and that they should expect more junior members to be more risk averse/cautious. If, after discussion with a more senior person or with me, a different approach was agreed that did not mean the first advice was wrong. It usually meant that someone with a wider experience had brought a broader perspective to the risks being assumed and found a suitable way to address them. This helped build confidence in the team and also ensured that decisions were made at the appropriate level.

In addition, I also held regular sessions with the whole team where we would debate and discuss some of the tricky issues we had dealt with or could foresee so that we could all build up a repository of decisions that would assist us to make **judgements** in the future. This enabled us to draw up a list of **red lines** we would not cross and that we could use to assist our decision making. Too often I have seen organisations incrementally make decisions that, while each individual increment is small, ends up in a line being crossed and it not noticed until it is too late.

I have also included in my contract with external lawyers and advisors a contractual requirement for them to inform me if they become aware that the organisation is taking forward any actions which in

their opinion could place the organisation at **undue risk** or if the organisation was not taking due account of the advice they had received. I also ensured that colleagues were aware of this to ensure openness and trust. While I have seen few examples of this being used it did lead to a better relationship between all concerned.

I have sought to build a **trusted relationship** across the organisation. First among these were strong relationships with both the Chair and with the CEO. This was fundamental to ensure that there was the right **information flow up and down** between the board and the executive. Building these relationships enabled me, in some situations, to be the conduit of difficult messages in a constructive way that facilitated finding a solution rather than causing conflict. While clear accountabilities in an Executive team undoubtedly are needed to ensure delivery of objectives, situations can arise in certain less black and white topics, such as sustainability and compliance, that are cross cutting across individual objectives. I have found myself, on occasion, as the person who has had to lead on supporting the Chief Executive to enable and facilitate discussions to resolve some tricky **cross cutting issues**. This could be because, in my role, I had spotted an issue that needed to be resolved or it could be that I needed to develop the Agenda of meetings to ensure there was adequate time to address the issue. The latter can be particularly important for some sustainability issues that may only have longer-term impacts.

I also built a good relationship with the **Senior Independent Director**, as s/he could have a key role if there were issues related to the Chair/CEO and in particular the relationship between them. This could be because the Chair and CEO have too close a relationship or vice versa.

My role was sometimes described as the conscience of the company but personally I think there is a danger that this can lead to other people 'outsourcing' this to the Company Secretary. All involved need to be on top of how the area of governance, reporting and sustainability etc is developing in the external world so that they can ensure the company stays abreast of developments and changes its arrangement to meet ever evolving requirements. My role was to ensure that this happened, and I have found a regular **forward-looking report from the Company Secretary to the Board** a very useful mechanism to keep the directors informed. Some regular training on the topic from interesting external speakers also supported this and could often be done around a board dinner in a relatively informal setting, which encouraged discussion.

Succession planning and recruitment arrangements particularly for Non-Executives were important issues for me where I was supported by HR colleagues. It was critical to understand the key skills of current directors, informed by proper skills analysis, and whether there are any gaps to be filled by new NEDS. This is not simply about gender and ethnicity but also about **cognitive diversity and a range of business experience to ensure challenge and avoid groupthink.** In addition, there historically was a tendency to think that utilities were different, and you needed to have utility experience to add value. There is now much more awareness about similarities as well as difference for different sectors and recognition that diversity of skills and experience facilitates better decision making. This all needs to be informed by a clear understanding of the term of office of the NEDs to ensure that there is a managed turnover of NEDS to meet governance expectations on independence, skills mix etc.

Good **induction processes** covering all aspects of the company and the role of a director for new Non-Executive and Executive members was critical and I had a key role in ensuring this was carried out effectively and that my role was understood. These must lead to a **full understanding of both the business and its purpose but also the legal and regulatory framework within which it operates and how these may develop, including in terms of the wider social and environmental context.** Getting new NEDs out to meet people across the business and see operations is a great way to ensure they understand your business but also that people get a chance to meet them. Done effectively it can reinforce the purpose of the company as well as the **cultural and ethical values** that should underpin all that is done.

An effective Company Secretary needs to work effectively to build and implement a **governance framework** that delivers the right information, at the right time and in the right manner. This should enable the directors to carry out good oversight and control and make good decisions as well as enable the executive team to get on with the running the organisation. Getting the right level of reporting to understand what has happened, the underlying trends and what may happen and presenting it in an easily accessible and digestible way is a perennial issue for all boards and executive teams. It perhaps takes on **added importance in companies that use private capital to deliver public value**. The Company Secretary has a key role to play in this, but good reporting needs the support and involvement of the whole Executive team.

In my experience, when it is all working well, there is little noise on issues such as agendas; quality of papers, time spent, and the quality of the coffee and the focus is on the key business issues. However, if these processes are not efficient then they can detract from the ability of both the board and executive to be effective. Like every part of business, good planning and leadership enables good delivery. While the Company Secretary is responsible for the governance arrangements they cannot design and implement good processes without the **support and engagement of everyone involved** and I saw this as key part of my remit.

Over the years I have found the following **useful tools** to enable me to do that part of my job as effectively as possible. While they may appear somewhat obvious and simple in my experience it needs resilience and perseverance to get people to initially focus on what appear to be dull and boring governance steps and to accept that the Company Secretary has a much more critical role than a glorified administrator. Done effectively with proper engagement they can transform the ability of everyone to do their job effectively, mitigate longer-term risks and improve organisational resilience.

- A **Board Calendar** setting out clearly what needs to be done when during the year which is properly discussed and agreed with the Executive team. The benefit of this is that it shows all the routine/regular matters which need to be addressed during the year such as strategy discussions, business planning, operational reporting, results etc and therefore enables better planning of when to address other key issues that are not so time critical. It also **provides assurance that the company's purpose is properly covered in the governance arrangements**. For example, for major projects it should help the executive consider whether they take it to the board in various stages to get the board better informed before a decision is required. If this is done with the Executive team and Chairman, it then leads to better agenda planning and time allocation for both the Board and its Committees and better decisions at these levels.
- An effective **Committee structure** with clear accountabilities and information flows to the Board is crucial. It can take some time to ensure the Terms of Reference of the Committees are fit for purpose and that the workload is allocated effectively to Committees, but it is then usually possible to spend more time on key issues. I would again restate the point I made above that this cannot be done by the Company Secretary alone and that, to be effective in the long term, it needs proper engagement from Executive colleagues and Board about what they want to achieve from Committees. There are a number of different approaches to Audit, Risk, Compliance and Sustainability Committee arrangements and these need to be debated and an approach decided on that ensures an effective allocation of topics avoiding issues falling down between the gaps as well as duplication. There is also a degree of inevitability that this will need to develop and change over time as the demands of the external world as well as law and regulation change so it should be subject to regular review. Getting the right information into Committees with effective reporting from Committees to the Board can make a huge difference to the effectiveness of the governance arrangements.
- An **additional challenge for regulated utilities where the regulated entity is often a subsidiary company is ensuring that decisions and oversight take place and are recorded**

effectively in the right legal entity to ensure all legal and regulatory requirements are complied with. It is important that each company maintains appropriate books and records to be able to demonstrate compliance with its regulatory and legal requirements. This can sometimes feel like a bureaucratic and unnecessarily repetitive process (particularly if there are common directors on the respective boards) but it is critical. Very often Minutes of meetings are only ever looked at carefully by third parties when something has gone wrong and then it will be important to be able to evidence that the appropriate information was provided and the decisions made by the right directors taking account of their duties as a director of that company. This is currently a very topical issue for John Varley the ex-CEO of Barclays! The feelings I experienced when I found out that a subsidiary company in my new employer had declared unlawful dividends with potentially catastrophic consequences lives with me. The secretariat team had historically been asked to run a paper meeting at the year-end to regularise dividend payments, as they had been unable to get the directors to hold a proper meeting with appropriate papers etc. It certainly made me much more focused on ensuring that each legal entity in a group fulfils its own obligations

- The list of **Matters Reserved to the Board and Scheme of Delegation** is another key document. This should set out clearly what are board decisions as well as who can decide what at different levels in the organisation. Historically Schemes often focused on spend limits but this omitted the entering into of obligations which could often be a more material risk than the spend itself, for example indemnities or environmental liabilities. A good Scheme of Delegations should address the entering into commitments more generally and are an important part of the control and governance arrangements. This is particularly important for issues which impact on sustainability which may span the remits of different Committees.
- Effective buy in and support for the **template for Board and Committee papers** and rigour on ensuring papers align with requirements and are delivered on time for circulation to the meeting is critical. It should always be clear from the paper why it is coming to the meeting and what decision is required. In my view papers should get shorter the higher up the decision-making ladder they go but this can be a very difficult objective to achieve. Too often the author feels the need to demonstrate how much thought and effort has gone into considering the topic by setting this out in detail in the paper. Directors delving into the detail rather than seeking assurance that the issues have been properly addressed earlier in the process can exacerbate this. Boards should demand shorter papers, which set out clearly the decision required. This should be supported by key information, an assessment of the risks associated with the decision and the process whereby the Executive team/author has gained a proper understanding of the issues so they can support the recommendation sought. If this template and process is agreed and buy in achieved then, if a poor or late paper comes to the Executive or Board, the Executive accountable for that area should be taken to task rather than the author of the paper! It also is invaluable in getting papers in on time if the Chair of any meeting refuses to allow late circulation of papers!
- **Good Agenda planning** by the Chairs of the Board and Committees with the Secretary including allocated times for individual items and the Chair receiving a good briefing on the issues can make a difference. This should assist the Chair then to manage the meeting effectively.
- A **review** at the end of each meeting of what worked well and not so well so that feedback is done in the moment can be invaluable.
- Good externally facilitated board and committee **effectiveness reviews** can be extremely helpful if all engage, the work is specified properly and a good third party instructed - and it is not seen as a tick box exercise.

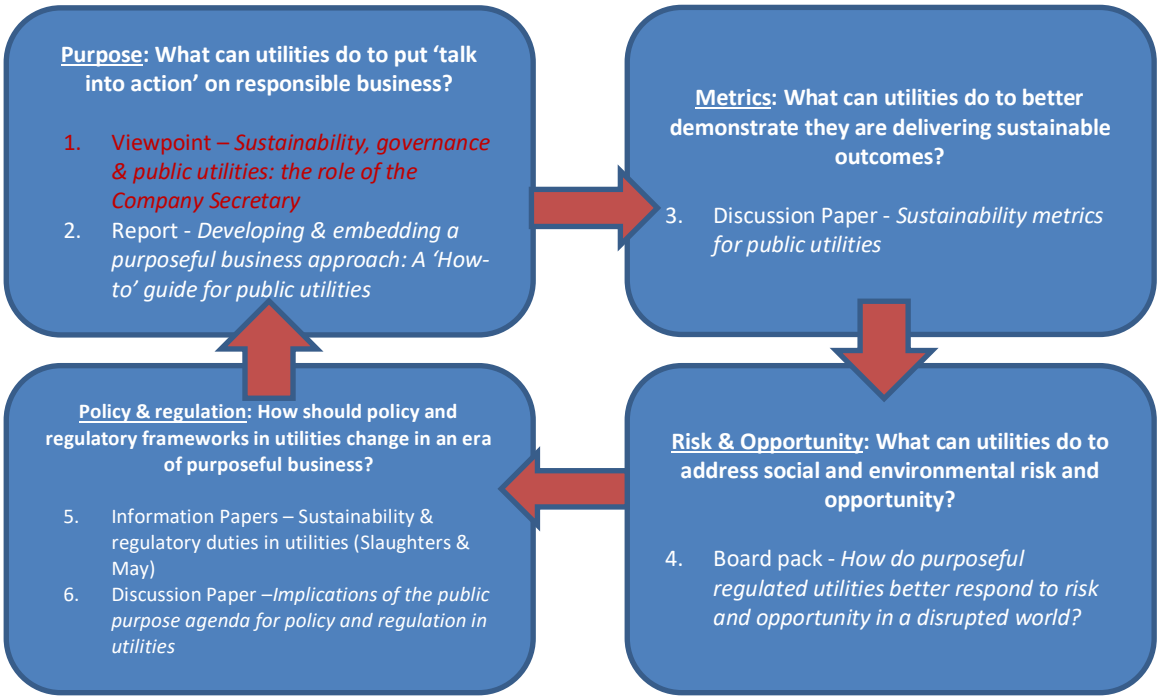
My message is that all involved should support the Company Secretary but there should be high expectations of what they can do to add value to your organisation. These are rapidly changing times with a need for us all to do the right thing, efficiently

and well and to be able to evidence how this is achieved.

Expectations on utilities who play a key part in everyone's lives are understandably and justifiably high. The drive for a more sustainable future with a clear purpose will demand from us all a clear focus on good governance to ensure good decision making, transparent reporting and effective risk management. Long gone are the days when the role of the Company Secretary was to compile a set of papers, circulate them and prepare a set of Minutes. They must be focused on getting all the technical aspect of the job done properly as well as working with all involved to appreciate the key future trends to help the organisation to meet its purpose over the long term. The costs in both financial and reputational terms in not taking the right governance steps usually outweigh by an order of magnitude the costs of getting it right first time.

In conclusion I would encourage **discussion between key players** (eg Chair, CEO, Board members and Executive team) **on the following questions** which I believe will enable you to develop effective and flexible governance arrangements to address the many challenges you face:

1. How would you describe the role of the Company Secretary?
2. Is you understanding of the role the same as colleagues and the Company Secretary them self? If not, what are you going to do to resolve any differences?
3. Does the Company Secretary's role need to develop to meet the needs of the future?
4. Do you ever discuss the tensions within the role to be both a facilitator of business success but also the 'police' to ensure things are done properly? If not, should you arrange one to ensure expectations are clear on all sides? Do you encourage and support your Company Secretary to speak up on tricky issues? Do you value their independence?
5. Who owns the governance arrangements; is it the Company Secretary or is it a joint accountability of the Board and Executive? Do you get irritated by some of the apparent 'bureaucracy'? If you do, how can you achieve a better understanding of why it is needed and how it is done so you can support effective governance?
6. Do you understand how expectations are changing in relation to company purpose and sustainability issues? How do you ensure sufficient Board, Committee and Executive time is allocated to these issues to enable you to be ready to address the changing requirements?



Sustainability First's Fair for the Future Project

Putting purpose into action in public utilities

A multi-stakeholder iterative approach

2020 forthcoming outputs